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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/580,549

04/03/2007

Matthias Schnabelrauch

51584

5559

1609

7590

04/12/2011

ROYLANCE, ABRAMS, BERDO & GOODMAN, L.L.P.

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SUITE 600

WASHINGTON,, DC 20036

EXAMINER

PALENIK, JEFFREY T

ART UNIT

PAPER NUMBER

1615

MAIL DATE

DELIVERY MODE

04/12/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<b>Application No.</b> 10/580,549	<b>Applicant(s)</b> SCHNABELRAUCH ET AL.	
	<b>Examiner</b> JEFFREY PALENIK	<b>Art Unit</b> 1615	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 07 March 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b) ☐ They raise the issue of new matter (see NOTE below);  
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: \_\_\_\_\_.  
 Claim(s) objected to: \_\_\_\_\_.  
 Claim(s) rejected: 1,2,4-7,9-29,31 and 40-43.  
 Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10. ☒ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
 13. ☐ Other: \_\_\_\_\_.

/Jeffrey T. Palenik/  
Examiner, Art Unit 1615

/Robert A. Wax/  
Supervisory Patent Examiner, Art Unit 1615

Continuation of 11. does NOT place the application in condition for allowance because: Applicants' arguments and Rule 132 affidavit with regard to the rejection of claims 1, 2, 4-7, 9-29, 31 and 40-43 under 35 USC 103(a) as being unpatentable over the combined teachings of Schnabelrauch et al. (herein the "'403'") and Draenert et al. have been fully considered but they are not persuasive. The Examiner further sets out that since the remarks very closely parallel the affidavit, that the two documents will be considered as presenting the same response to the rejection.

Applicants initially argue that the '403 is not readable upon or suggestive of the instantly claimed method since it fails to disclose the specific calcium phosphate recited in the claims. It is further argued by Applicants that "[s]ince the behavior of a cement is strongly dependent on the actual filler employed, a skilled artisan would have had no reason to conclude that a porous filler material would indeed be effective". It is then alleged that the porous calcium phosphate embodiments disclosed by Draenert do not remedy the apparent shortcomings of the '403 reference, despite Draenert being directed to the use of porous calcium phosphates for the exact same purpose as the '403 reference. Concerning the Draenert reference, Applicants argue that the pore volume of the calcium phosphates employed as the starting material, while possessing pore volumes which read on the instant filler, pose a disadvantage in that, on mixing, a large amount of uncured monomer will remain which is at risk of being undesirably passed to the patient's circulatory system. The remedy to this issue, as discussed by Applicants is to pre-treat the calcium phosphate particles, either by sintering or through absorption of a liquid filler, thereby reducing their pore volume to less than that which is instantly claimed. It is on these grounds that Applicants assert that the combined teachings, teach away from the instant base claim.

The Examiner respectfully disagrees. At the outset, the Examiner acknowledges that the calcium phosphate disclosed by the '403 reference is silent as to porosity overall. That is, whether or not the particles are porous, is not expressly disclosed; only that the instantly claimed compounds (e.g., initiator, activator, etc.) are in fact applied to (e.g., coated) to said particles. However, the Examiner maintains that the teaching in the '403 reference wherein the particles are coated on their surface, is not expressly indicative as to whether or not the particles are porous. The Examiner maintains this position on the grounds that whether or not the particles contain pores does not change the fact that they would be coated on their surface; it only changes the amount of surface area on the particle. As such, given the deficiencies of the references directed to the alleged critical properties, the Examiner found further definition of calcium particles in the art as defined by Draenert. The secondary reference, teaches using forms of calcium phosphate, specifically, tricalcium phosphate as the basis for forming bone cements. The Examiner maintains that tricalcium phosphate having the instantly claimed pore volume reads on this despite the disadvantages discussed by Applicants, particularly since the tricalcium phosphate of the reference is clearly employed as the starting material. It is respectfully submitted that Applicants' instant method does not preclude or prevent the use of pretreated tricalcium phosphate as disclosed in the art. In the instant case, the Examiner maintains that it would have been obvious to the ordinarily skilled artisan to employ such a pretreatment in order to overcome the risk of uncured monomers being present in the final cement composition.

For these reasons, Applicants' arguments are found unpersuasive. Said rejection is therefore maintained.